KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant has not met his burden of presenting evidence of extenuation or mitigation to overcome the strong indicators of foreign preference raised by: (1) his exercise of foreign citizenship with both Israel and South Africa; (2) his possession and use of foreign passports; and (3) his service in the Israeli military. Likewise, he has not met his burden of presenting evidence of extenuation or mitigation to overcome the foreign influence security concern raised by his family ties to Israel. Clearance is denied.

CASENO: 04-06216.h1

DATE: 03/30/2006

DATE: March 30, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-06216

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

David K. Felsen, Esq.

SYNOPSIS

Applicant has not met his burden of presenting evidence of extenuation or mitigation to overcome the strong indicators of foreign preference raised by: (1) his exercise of foreign citizenship with both Israel and South Africa; (2) his possession and use of foreign passports; and (3) his service in the Israeli military. Likewise, he has not met his burden of presenting evidence of extenuation or mitigation to overcome the foreign influence security concern raised by his family ties to Israel. Clearance is denied.

STATEMENT OF THE CASE

This case arose when the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 24, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision.[(1)] The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline C for foreign preference and Guideline B for foreign influence. Applicant replied to the SOR on December 7, 2004, and requested a hearing. The case was assigned to me June 20, 2005. A notice of hearing was issued scheduling the hearing for September 9, 2005. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript September 21, 2005.

FINDINGS OF FACT

In his Answer, Applicant admitted the foreign preference allegations in subparagraphs 1.a, 1.b, 1.c, 1.d, 1.e, 1.f, and he admitted the foreign influence allegation in subparagraph 2.a. In addition, he provided a brief explanation for each admission. Applicant's admissions to the SOR allegations are incorporated herein by reference. In addition, I make the following findings of fact.

Applicant is a 39-year-old married man who is seeking a security clearance for employment with a defense contractor. His wife has dual citizenship with South Africa and the U.S. They have two minor children. Their son is a native-born U.S. citizen and he has dual citizenship with South Africa, and their daughter is a native-born U.S. citizen.

Applicant was hired by his current employer in October 2002. He works as a computer specialist in the field of networks and technology integration. His current supervisor, a civilian employee for a military department, described Applicant as a gifted computer specialist and whose work performance has been exemplary. Likewise, the supervisor described Applicant as "the most trustworthy employee [he's] worked with in 20 years of federal service" (Transcript at 126). The supervisor has no reservations or concerns about Applicant's suitability to hold a security clearance.

Applicant's parents were both born in Israel. Applicant was born in the U.S. in 1966 when his parents were in the U.S. on academic or student visas. As a result, Applicant became a dual citizen of the U.S. and Israel. In 1970, when Applicant was about four years old, Applicant's family returned to Israel where they lived until the family moved to South Africa in 1978. The family moved because Applicant's father obtained a job there. Applicant lived in South Africa with his family from 1978 to about May 1989. During this period, Applicant and the rest of his family became South African citizens by operation of law based on residency (Exhibit C). Also during this period, Applicant completed his formal education, including studying computer science at the University of South Africa. He was awarded a bachelor's degree in December 1988.

In about May 1989, the then 23-year-old Applicant decided to move to Israel. He was going through a process of determining where he wanted to live and he decided to move to Israel, in part, because his older brother was living there. Applicant lived in Israel for about 18 months, 12 of which he spent as a soldier in the Israeli military as required by Israeli law. He was discharged at the rank of corporal, and he remained in Israel for another three months or so before he decided he did not want to continue living there.

He returned to South Africa in the summer of 1990 as his parents where living there. He married his wife, a native of South Africa, in September 1993. After their marriage, Applicant and his wife thought about where they wanted to live and raise a family. They picked the U.S. and moved here on January 1, 1994. Applicant and his wife decided to move to the U.S. for several reasons: (1) they thought the U.S. was the best place to raise a family; (2) they view the U.S. as a great county of opportunity; and (3) they view the U.S. as a leader in the international community (Transcript at 62 and 66). Applicant has been gainfully employed in various jobs as a computer scientist in the U.S. since March 1994.

Sometime in mid-1993, Applicant's parents decided to leave South Africa for better careers in the U.S. His father works as a contractor or consultant for an international banking organization, and his mother works in the field of child development for a national health organization. Applicant's father has dual citizenship with Israel and South Africa and he is a legal resident of the U.S. Applicant's mother has citizenship with Israel, South Africa, and the U.S.

Applicant's parents-in-law are citizens and residents of South Africa. Likewise, his sister-in-law is a citizen and resident of South Africa and she is married and has two children. Applicant's parents-in-law are both retired, and his father-in-law is unable to travel due to health reasons.

Applicant has three brothers, all of whom are native-born citizens of Israel. His eldest brother

is a citizen and resident of Israel and he also holds citizenship with South Africa. This brother has a computer background and works for an insurance company as its chief product officer. This brother served in the Israel Army for approximately five years completing his active military service obligation in about March 1990 (Exhibit B). Applicant believes this brother's rank was that of a junior officer (lieutenant or captain) and that he served in the Army's intelligence division or in an intelligence position, although Applicant has no idea of the precise nature of his brother's military duties. The record is unclear whether the eldest brother is required to serve in a reserve capacity. Applicant has regular contact (monthly telephone calls) with this brother and sees him when this brother travels to the U.S. for family visits.

Applicant's second brother is living and working in Canada as a self-employed information-technology specialist. This brother has citizenship with Israel, South Africa, and Canada. Applicant has regular contact (monthly telephone calls) with this brother and he sees this brother about four times a year when the brother travels to the U.S. for family visits.

Applicant's third brother is residing in the U.S. in the same geographic area as Applicant and his parents. This brother has citizenship with Israel and South Africa. He has been in the U.S. for eight or nine years or so, and Applicant is sponsoring him for his U.S. citizenship. This brother works in sales for a large computer software company.

At one time or another, Applicant has possessed and used passports issued by the U.S., Israel, and South Africa (Exhibit 4). He now possesses a U.S. passport, and he turned in or surrendered his expired Israeli passport and his unexpired South African passport in 2005 (Exhibits A and D). Applicant obtained a U.S. passport in August 1994, several months after his arrival.

In December 1993, Applicant applied for and obtained an Israeli passport. He applied for the passport in case he wanted to visit family members in Israel (grandparents and his brother). The passport expired in December 2003, and while it

was valid, Applicant did not use this particular Israeli passport. Before his arrival in the U.S. in 1994, he used an Israeli passport for his trips in and out of Israel. As an Israeli citizen, Applicant understands he is required by law to use an Israeli passport whenever he enters or departs the country.

In January 1998, Applicant applied for and obtained a South African passport. He used a South African passport whenever he traveled with his family to South Africa as he did in 1995, 1996, 1998, 1999, 2000, 2002, and 2003. Applicant and his family typically take regular trips to South Africa for family visits. His most recent use of the South African passport was for a trip there in 2005. This trip occurred after the SOR was issued, but before the hearing in this matter. As a South African citizen, Applicant understands he is required by law to use a South African passport whenever he enters or departs the country.

Sometime while he was living in South Africa, Applicant participated in a referendum concerning whether the dismantling of apartheid should continue. He supported the dismantling of apartheid and he participated in the referendum (Transcript at 67-68). Otherwise, he does not recall voting in any foreign election.

Applicant disclosed his foreign travel to South Africa when he completed security-clearance applications in 2002 (Exhibit 2) and 2003 (Exhibit 1). In the 2003 application, Applicant also disclosed a trip to Australia in 1998. In the remarks section, he noted that he made the trip to visit friends and to explore job opportunities in Australia.

During his background investigation (Exhibit 3) and the hearing, Applicant said he was willing to renounce his citizenship with both Israel and South Africa. Aside from his statements, he has not taken any affirmative steps to renounce. He considers himself a loyal U.S. citizen, and he has retained his foreign citizenship to ensure easy passage while entering and departing both countries.

Applicant has not served in the U.S. military, nor did he register with the U.S. Selective Service System within 30 days of his 18th birthday as required by federal law. Applicant explained that he became aware of the requirement to register when he received the SOR. He then made inquiry with the Selective Service System and learned that he cannot register after reaching the age of 26 (Exhibit E). Applicant's explanation that he was unaware of the registration requirement is accepted as credible and worthy of belief.

Neither Applicant nor his wife has business or financial interests in Israel, South Africa, or any other foreign country. They own a home in the U.S., and their investments (both retirement and college savings) are in the U.S.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.[(2)] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(3)] There is no presumption in favor of granting or continuing access to classified information.[(4)] The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.[(5)] An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[(6)] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(7)]

As noted by the Supreme Court in *Department of Navy v. Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(8)] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

SOR paragraph 1 alleges foreign preference under Guideline C.[(9)] A security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. In particular, the exercise of dual citizenship raises a security concern because the active exercise of foreign citizenship may indicate a preference for that foreign

country over the U.S. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the guideline.

Here, the government established its case under Guideline C.[(10)] This case is beyond the situation of passive or mere possession of dual citizenship. Applicant, as an adult, actively exercised dual citizenship for many years, and the record evidence shows strong indicators of foreign preference. As an adult, Applicant engaged in the following activities: (1) possessing an Israeli passport; (2) living in Israel for about 18 months; (3) serving in the Israeli military; (4) living in South Africa for several years; (5) participating in a referendum in South Africa;[(11)] (6) possessing and using a South African passport; and (7) obtaining, possessing, and using a South African passport after moving to the U.S. in 1994, including using it as recently as 2005. Applicant's failure to register with the Selective Service System is not indicative of foreign preference, however, because Applicant was genuinely unaware of the registration requirement. Given the record evidence, DC 1,[(12)] DC 2,[(13)] and DC 3[(14)] apply against Applicant, and these circumstances are strong indicators of foreign preference.

In mitigation, I reviewed the four MC under the guideline and conclude Applicant has not met his burden of presenting evidence of extenuation or mitigation to overcome the strong indicators of foreign preference. MC 1[(15)] does not apply because Applicant, as an adult, exercised his foreign citizenship while a U.S. citizen until moving to the U.S. in 1994. He then continued to exercise foreign citizenship by possessing and/or using foreign passports. MC 2[(16)] does not apply because the indicators of foreign preference (as listed above) occurred while he was a U.S. citizen. MC 3[(17)] does not apply because there is no indication the U.S. government has sanctioned Applicant's activities. Applicant does receive some credit under MC 4[(18)] because he has said he is willing to renounce his foreign citizenship with Israel and South Africa. The credit is limited, however, because he has not taken any affirmative steps to renounce.

Applicant's decision to relocate to the U.S. in 1994 and pursue a career in computer science was a significant one and certainly indicates a desire to live and work in the U.S. Although he relocated to the U.S., he then continued to exercise his foreign citizenship and did not give up his passports until 2005 after receiving the SOR. Indeed, it is most likely that Applicant would still have the foreign passports had he not applied for a security clearance. Perhaps an apt description for Applicant is that he is a citizen of the world. Viewing the record evidence as a whole, Applicant chose to remain tied to Israel and South Africa, because it suited him. This situation, although perfectly legal and moral, creates a divided preference between the U.S., Israel, and South Africa, which raises a security concern that Applicant is unable to extenuate or mitigate. Accordingly, Guideline C is decided against Applicant.

SOR paragraph 2 alleges foreign influence under Guideline B.[(19)] The allegation is based on his family ties (his eldest brother) to Israel. A security concern may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information.

Here, the government established its case under Guideline B. Applicant's eldest brother is a citizen and resident of Israel. Applicant has monthly contact with this brother, and Applicant sees this brother when he visits the U.S. This is the brother Applicant relied on when he lived in Israel during 1989 - 1990. Of note, this brother served as an Israeli military officer on active duty for about five years. Taken together, these circumstances raise a security concern under DC 1[(20)] because Applicant's eldest brother is a citizen and resident of Israel who was connected to a foreign government (the Israeli military) in the past. This is the type of foreign connection that could create the potential for foreign influence that could result in the compromise of classified information.

I reviewed the mitigating conditions under Guideline B and conclude Applicant has not met his burden of presenting evidence of extenuation or mitigation to overcome the foreign influence security concern. Concerning the formal mitigating conditions under the guideline, Applicant receives some credit under MC 5[(21)] because he has no financial or business interests in Israel or any other foreign country. The credit is limited, however, because the SOR does not allege that Applicant has a substantial financial or business interest in a foreign country. The remaining MC under the guideline do not apply based on the facts and circumstances here. Applicant's family ties to his eldest brother, coupled with the totality of foreign connections present here, creates a security concern that he is unable to extenuate or mitigate. Accordingly, Guideline B is decided against Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. This decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and this case presents more than ample doubt.[(22)] In reaching my decision, I considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline C: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant[(23)]

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: Against Applicant

Subparagraph f: Against Applicant

SOR ¶ 2-Guideline B: Against Applicant

Subparagraph a: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

2. Executive Order 10865, § 7.

3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

5. Directive, Enclosure 3, Item E3.1.14.

6. Directive, Enclosure 3, Item E3.1.15.

7. Directive, Enclosure 3, Item E3.1.15.

8. 484 U.S. at 528, 531 (1988).

9. Directive, Enclosure 2, Attachment 3.

10. In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a policy memorandum--the so-called Money Memorandum, because it is signed by Assistant Secretary Arthur L. Money--clarifying the application of the foreign preference security guideline for cases involving possession and/or use of a foreign passport. Applicant complied with the requirements of the Money emorandum by surrendering the foreign passports. Accordingly, this matter will not be addressed further under Guideline C.

11. I considered Applicant's participation in the referendum for the limited purpose of assessing the totality of matters indicating foreign preference. Because this matter was not alleged in the SOR, I did not consider it for the purpose of applying a disqualifying condition under the guideline.

12. E2.A3.1.2.1. The exercise of dual citizenship.

13. E2.A3.1.2.2. Possession and/or use of a foreign passport.

14. E2.A3.1.2.3. Military service or a willingness to bear arms for a foreign country.

15. E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

16. E2.A3.1.3.2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

17. E2.A3.1.3.3. Activity is sanctioned by the United States.

18. E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.

19. Directive, Enclosure 2, Attachment 2.

20. E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

21. E2.A2.1.3.5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

22. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials").

23. Subparagraph b is a compound allegation dealing with two entirely different matters: (1) the failure to register with the Selective Service System; and (2) the Israeli military service. I decided this subparagraph against Applicant only due to his Israeli military service.